In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-427

SUN SHIPBUILDING & DRY DOCK CO., PETITIONER

v.

UNITED STATES OF AMERICA and
PRUDENTIAL-GRACE LINES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

---

1. The instant case arose under a tripartite contract under which petitioner Sun Shipbuilding & Dry Dock Company agreed to construct six general cargo vessels for shipowner Prudential-Grace Lines Inc. ("Grace"), with the United States paying a portion of the contract price. Under the contract's "disputes clause," all disputes arising under the contract were to be decided by the Chief, Office of Ship Construc-

tion, of the United States Maritime Administration, subject to appeal to the Maritime Subsidy Board, whose decision would, with limited exceptions, be final and conclusive. Pursuant to this disputes clause, petitioner and Grace submitted certain contract disputes to the foregoing administrative process.

During the pendency of the administrative process, petitioner brought suit in the United States Court of Claims, seeking that court's determination of the identical contract issues then pending in the administrative process. Petitioner urged that it was not required to complete the administrative process because the Maritime Subsidy Board had breached its covenant to render a timely decision (Pet. App. A2-A4, A10).[1]

The Court of Claims unanimously dismissed petitioner's suit for failure to exhaust administrative remedies (Pet. App. A1-A22). The court stated (Pet. App. A10):

> There is, of course, no rule of thumb for appraising delays in the contractual-administrative process. Like all tribunals, the procuring agency has considerable discretion and leeway in controlling its procedure, and must have due time to decide fairly. On the other hand, it cannot abuse its discretion by dragging its feet so leadenly that the delay becomes intolerable. The

[1] Petitioner filed the instant suit on October 6, 1971, several weeks after the Board rendered a decision, at least in part unfavorable to petitioner, in another case involving similar issues. See Pet. App. A11-A13; Affidavit of Michael Joseph, Exhibit 87, p. 18.

> overall standard for evaluating the propriety of a delay looks to the particular case and the particular situation: the agency "cannot wait indefinitely before making a decision, but must act within a reasonable time under the existing facts and circumstances." *Universal Ecsco Corp.* v. *United States, supra*, 181 Ct. Cl. at 18, 385 F. 2d at 425.

Applying the foregoing principles, the court, after a detailed review of the facts, concluded that there was no showing that "the Government has thus far breached its obligation to render a timely decision. The agency has not acted unlawfully or abused its discretion" (Pet. App. A16). Accordingly, the court dismissed the action without prejudice "to await the ending of the administrative process" (*ibid.*).

2. The petition presents no issues warranting review by this Court. As noted above, the court recognized the Board's duty to act "within a reasonable time under the existing facts and circumstances" (Pet. App. A10), and the petition raises only the factual issue whether in the particular circumstances of this case, the Board failed to do so. The court's opinion fully substantiates the correctness of the dismissal of the action.[2]

---

[2] The court noted, *inter alia*, that in large measure the delays were occasioned by actions and omissions of petitioner itself, including its delay in making available to Grace voluminous files essential for proper discovery (Pet. App. A12-A15). The court further noted that in July 1970 petitioner submitted to the Board a $5 million upward revision of its claim based on a new method of estimating costs which was

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1972.

---

before the Board in the case referred to in footnote 1, *supra*. (Pet. App. A12-A13). The latter fact answers petitioner's assertion (Pet. 9) that prior to its commencement of suit in October 1971, its claim had been pending for four years.

Although petitioner now asserts that a hearing is required to enable it to examine certain government officials who prepared affidavits relied upon by the court below (Pet. 10), it did not make this contention in the court below and does not justify its claim.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 479880 272